cable pole attachment rights to telecommunications providers to create a level playing field for attachments for wireline telecommunications services.

It defies common sense to argue that Congress intended to extend the definition of the term "pole attachments" to include wireless antennas. Wireline service providers need contiguous facilities (including rights-of-way) for the siting of their cables and, as such, benefit from the configuration of the electric utilities' distribution infrastructure. On the other hand, wireless providers do not need contiguous facilities for the siting of their antennas. Utility infrastructure is only one of a myriad of alternatives available to wireless providers. Wireless equipment can be mounted on any tall building or structure, such as water towers, standard communications towers, monopoles, billboards, highway light structures or church steeples. Wireless providers thus have a multitude of options, other than utility infrastructure, on which to locate their equipment.[114/] Indeed, utility distribution poles are not typically high enough to be an optimal choice for the placement of most wireless equipment. Accordingly, the underlying purpose of the Pole Attachments Act — to provide access to contiguous distribution infrastructure — simply does not come into play in the case of siting locations for wireless service providers.[115/]

114/ In addition, wireless facilities are much less "dense" than wireline facilities. Wireline facilities typically are deployed with approximately 25 attachments per mile. Wireless facilities, on the other hand, typically require only one attachment per 1-5 mile radius, depending upon the terrain. Moreover, wireline facilities must be located at the point of delivery of service to each house, which brings utility distribution facilities into play, whereas such location is not required in the case of wireless service.

115/ Only wireline telecommunications service providers would be disadvantaged vis-a-vis cable companies that are providing telecommunications service. Wireline telecommunications service providers are the only entities that arguably have a need

B. The Language And Structure Of The Statute Limits Its Application To Wireline Attachments

The view that Congress intended the Pole Attachments Act to be limited to wireline attachments is supported by an examination of both the language and structure of the statute, as amended by the 1996 Act.

First, there is not a single mention of wireless telecommunications anywhere in any version of the Pole Attachment Act amendments, either as the legislation was introduced in 1993-94 or as later introduced and passed in 1995-96.[116/] However, Congress did deal with the placement of wireless equipment in the 1996 Act, in § 704, immediately following the pole attachment amendments in § 703. Where Congress dealt with wireless providers, the statute clearly identified its subject matter as wireless telecommunications service.[117/]

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to attach their fiber optic cable to the same poles, ducts, conduit and rights-of-way as the cable companies. Wireless companies, by contrast, either do not have to attach their equipment to utility infrastructure at all (selecting tall buildings or other tall structures instead), or only require attachment to a limited number of selected poles. As such, a wireless company would not be significantly disadvantaged by having to pay a market rate for the poles it would need to use. The fact that a cable company was entitled to a regulated rate simply would not create a substantial "inequity" vis-a-vis a wireless competitor.

116/ Neither the House or Senate versions introduced in 1993-94 (H.R. 3636 and S. 1822), nor the House or Senate versions introduced in 1995-96 (H.R. 1555 and S. 652), contain any reference to wireless telecommunications or the attachment of wireless equipment. The House and Senate reports accompanying each of these bills, as well as the Conference Report on the final legislation, do not mention wireless telecommunications or wireless equipment in connection with pole attachments. Wireless providers simply were not on Congress' mind when it was dealing with pole attachments.

117/ Section 704 deals with "Facilities Siting" for wireless telecommunications service. Section 704(a) is entitled "National Wireless Telecommunications Siting Policy." It addresses local zoning authority to regulate the placement, construction and modification of personal wireless service facilities. Section 704(c) establishes a national policy of making Federal government "property, rights-of-way, and

The proposition that Congress had in mind wireline services, not wireless services, in the pole attachment amendments is further supported by the jurisdictional grant to the Commission contained in the statutory definition of "utility."[118/] Congress established that the FCC's jurisdiction is only triggered where a communications space for wire communications has been established on the utility infrastructure:

> Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.[119/]

The Senate Report explains that "if provision has been made for the attachment of wire communications, a communications nexus is established sufficient to justify, in a

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easements" available on a "fair, reasonable, and nondiscriminatory basis" for the placement of wireless telecommunications equipment. Interestingly, § 704 does not direct the FCC to impose a regulated rate for placement of wireless equipment on federal property. (This raises the related question of why Congress would single out only one class of potential antenna site owners (utilities) on which to impose rate regulation). Thus, when Congress intended to address wireless matters it was capable of doing so explicitly. And it did so in § 704, not in the pole attachment amendments in § 703.

118/ This grant of jurisdiction, originally made in the 1978 Act, was necessary because the FCC had concluded in 1977 that it had no jurisdiction to regulate pole attachment rental agreements between CATV systems and utilities. California Water & Tel. Co., 64 F.C.C. 2d 753 (1977); see H.R. Rep. No. 721, 95th Cong., 1st Sess. Part 2 at 6 (1977); S. Rep. No. 95-580 at 14, reprinted in 1978 U.S.C.C.A.N. at 122. The 1978 legislation was specifically intended to grant the FCC jurisdiction to regulate such agreements. S. Rep. No. 95-580 at 1, reprinted in 1978 U.S.C.C.A.N. at 109 (purpose of bill is "[t]o establish jurisdiction within the Federal Communications Commission (FCC) to regulate the provision by utilities to cable television systems of space on utility poles, ducts, conduits or other rights-of-way owned or controlled by those utilities").

119/ S. Rep. No. 95-580 at 15 (emphasis added).

jurisdictional sense, the intervention of the Commission."[120] Thus, the Commission's jurisdiction exists only where a utility has established a "communications space" for wire communications on its poles.[121]

The jurisdictional grant reflected in the definition of "utility" was unchanged by the 1996 Act.[122] Thus, while Congress expanded the universe of persons entitled to attach to utility poles to include telecommunications carriers, it did not change Congress' intent that the Commission's jurisdiction be "strictly circumscribed" to arrangements affecting the wireline "communications space" on the poles. The logical extension of this jurisdictional grant is that the entire regulatory scheme is limited to "wire communications."

Moreover, examination of the existing rate formula is instructive in determining what Congress had in mind with respect to pole attachments for telecommunications carriers.[123]

120/ Id. (emphasis added). The Senate Report admonishes that the "expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems." Id. (emphasis added).

121/ "As a technical matter, the cables are lashed to an aerial support strand, which in turn is affixed to a single point within the section of the pole designated as 'communications space.'" Texas Utilities Elec. Co. v. FCC, supra, 997 F.2d at 927.

122/ The 1996 Act defines "utility" as follows:

> The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.

123/ A further indication that Congress intended § 224 to be limited to wire facilities is reflected in the regulatory rate formula underlying this proceeding. The amended statute establishes two separate rate formulas to be applied to pole attachments. The current cable television rate formula is to be applied to pole attachments used by cable companies solely to provide cable service. A new rate formula, which will become effective in 2001, will be established for pole attachments by

Section 224(d)(1) provides that a utility is entitled to recover certain costs, up to a maximum of actual costs associated with a percentage of the "total usable space" on the utility's poles. The term "usable space" is defined in § 224(d)(2) as "the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment" (emphasis added). This definition is unchanged from the 1978 Act, which, as discussed above, unquestionably is limited to wireline services. The 1996 amendments apply this definition of usable space — wires, cables and associated equipment — to the rate formula for pole attachments by telecommunications carriers. For the rate formula of § 224(d) to have any meaning, therefore, the pole attachment must be a wire facility. There can be no plainer evidence of Congressional intent that pole attachments for telecommunications carriers are limited to wireline facilities.

AT&T relies on the language of the "pole attachments" definition, 47 U.S.C. § 224(a)(4), to make its argument that wireless attachments should be included under the Pole Attachments Act.[124/] As amended by the 1996 Act, the pole attachments definition

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telecommunications carriers, absent successful negotiation between the parties. Until the post-2001 rate provisions become effective, attachments by new telecommunications carriers without existing agreements will be governed by § 224(d). The language of the 1996 Act establishing interim application of the existing rate formula to telecommunications carriers is as follows:

> Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

47 U.S.C. § 224(d)(3) (emphasis added).

124/ See Comments of AT&T Corporation at 9 n.17.

includes "any attachment by a ... provider of telecommunications service."[125] Any attachment, the argument goes, means any attachment, and must, therefore, include attachments of wireless equipment.

This argument simply fails to account for other aspects of the statutory language, its legislative history, and the purpose of the 1996 Act. First, it is significant that the phrase "any attachment" was part of the pole attachments definition as originally enacted in 1978. No one could plausibly argue that the "any attachment" language authorized the attachment of wireless equipment under the 1978 Act. Second, as set out above, the jurisdiction of the FCC, articulated in the definition of "utility," remains unchanged by the 1996 Act and is defined in terms of wire communications. The Commission's jurisdiction thus continues to be "strictly circumscribed" to regulating arrangements governing attachments to utility pole wireline "communications space."[126] Third, the rate formula applicable to providers of telecommunications service under § 224(d) is articulated in terms of "usable space," which, as noted above, is defined as "the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment."[127] Reading "any attachment" to include wireless equipment would render the entire rate formula scheme set out in § 224(d) meaningless. Accordingly, reading "any attachment" to include wireless

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[125] Telecommunications service is elsewhere defined to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). This would include wireless providers.

[126] S. Rep. No. 580 at 15.

[127] 47 U.S.C. § 224(d)(2).

equipment would do violence to the language of the statute, its legislative history, and its underlying purpose.

C. Limitation Of Regulated Pole Attachments To Wireline Services Is Supported By Important Policy Considerations

1. FCC-Mandated "Rent Control" Of Certain Antenna Sites Is Not The Best Way To Achieve Rapid Rollout Of New Wireless Services

Sound policy reasons support the limitation of regulated pole attachments to wireline facilities. Until recently, no one, including wireless providers, read the Pole Attachments Act as covering wireless equipment, since it was clear and universally understood that the Act was limited to wire and cable attachments. Without any government intervention, electric utilities and wireless companies have been freely entering into site leasing arrangements. For example, many utilities already have master site lease agreements with PCS companies. These arrangements typically include a variety of utility-owned properties — office building rooftops, communications towers, substations and other real estate assets not included in the Pole Attachments Act. These market arrangements, freely entered into, are mutually beneficial to both parties. Furthermore, it is in an electric utility's best interest to continue to make productive use of all of its assets — including assets useful for antenna siting. Accordingly, these arrangements should continue to flourish. Any FCC-mandated rate regulation of a portion of the electric utility assets useful for antenna siting is more likely to disrupt than foster creative business arrangements between electric utilities and wireless companies. If the market is allowed to continue to work the way it has thus far, the result will be more siting availability for wireless carriers.

2. Extending § 224 To Wireless Equipment Would Have The Market-Distorting Effect Of Creating An Unlevel Playing Field Between Incumbent Wireless Providers And New Entrants

As a result of the universal understanding that the Pole Attachments Act does not cover wireless equipment, all of the substantial build-out of wireless services (cellular, SMR, paging, PCS) that has been accomplished to date has been undertaken without FCC-mandated rates for attachments to utility poles. If the Commission were now to expand the Pole Attachments Act to cover wireless equipment, this would bestow upon new entrants in the wireless field an economic advantage not enjoyed by incumbent wireless carriers that have already built out their systems. Such action would create an unlevel playing field between incumbent wireless providers and new entrants, presumably an undesirable result from a policy perspective.[128/]

CONCLUSION

The Electric Utilities suggest that the recommendations presented in these reply comments are consistent with the overall deregulation and pro-competition themes of the 1996 Act.

[128/] A corollary of this negative policy result would be that landlords for wireless equipment sites would be treated unequally in the event § 224 were extended to wireless equipment. Owners (including federal, state and local governments) of non-utility sites — buildings, towers, billboards, etc. — would be entitled to charge a market rate, while only utilities would be subject to an FCC-imposed rate. In effect, utilities would be the only landlords subject to a form of rent control, while every other site owner would be entitled to obtain a market rate. And the disparity is non-trivial: market rates for wireless equipment sites typically run in the range of $1000 to $2000 per month, while regulated pole attachments typically are $6 to $10 per year. There is no conceivable policy justification for such disparate treatment.

WHEREFORE, THE PREMISES CONSIDERED, the Electric Utilities respectfully request that the Commission act upon the pole attachment rate formula issues raised in this rulemaking in a manner consistent with the views expressed herein.

Respectfully submitted,

AMERICAN ELECTRIC POWER SERVICE CORPORATION
COMMONWEALTH EDISON COMPANY
DUKE POWER COMPANY
FLORIDA POWER AND LIGHT COMPANY
NORTHERN STATES POWER COMPANY

By: _____

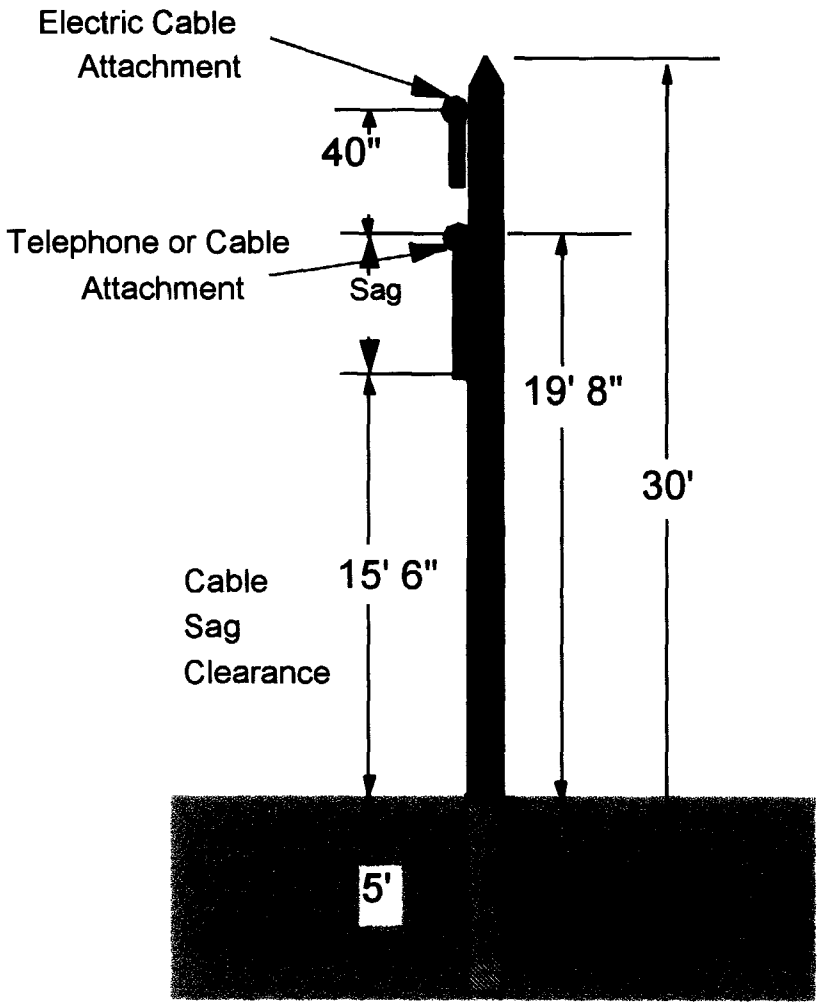
Shirley S. Fujimoto
Christine M. Gill
Thomas J. Navin
Catherine M. Krupka

Their Attorneys
McDERMOTT, WILL & EMERY
1850 K Street N.W., Suite 500
Washington, D.C. 20006
(202)887-8000

August 11, 1997

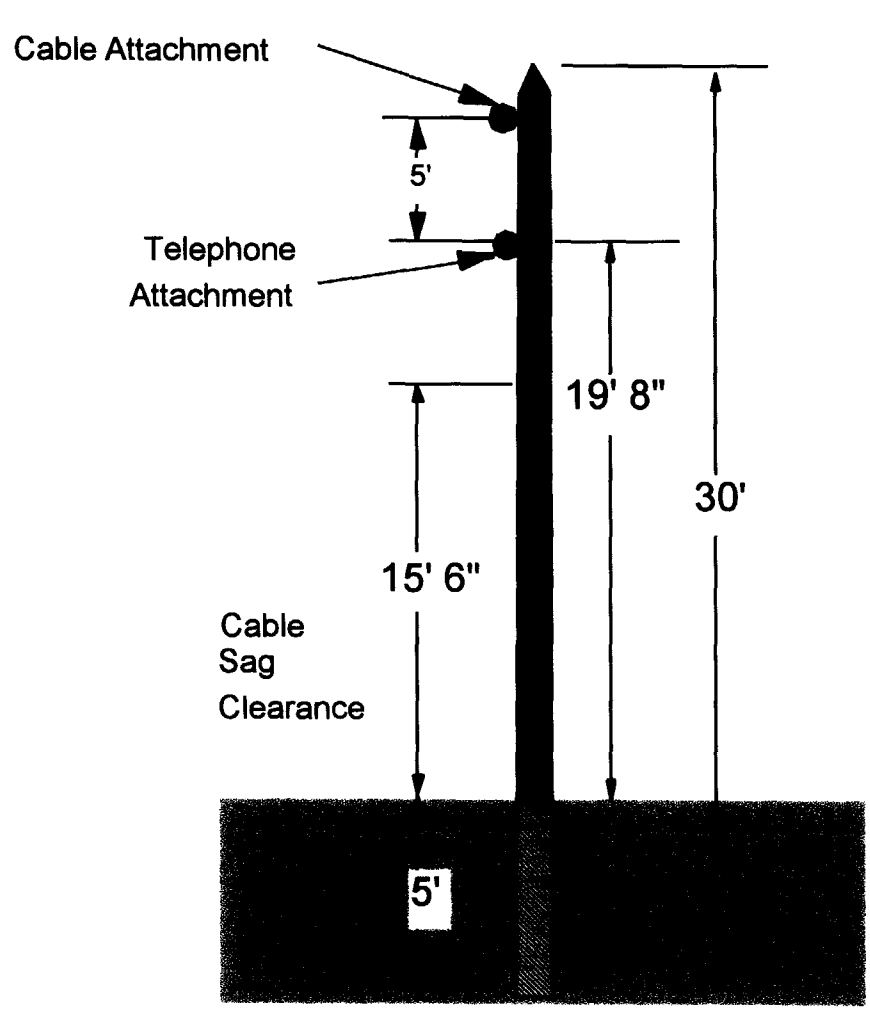
Exhibit 1

Electric Pole



Electric uses one foot of space. Two feet of usable space available.

Telephone Pole - No Electric Attachment

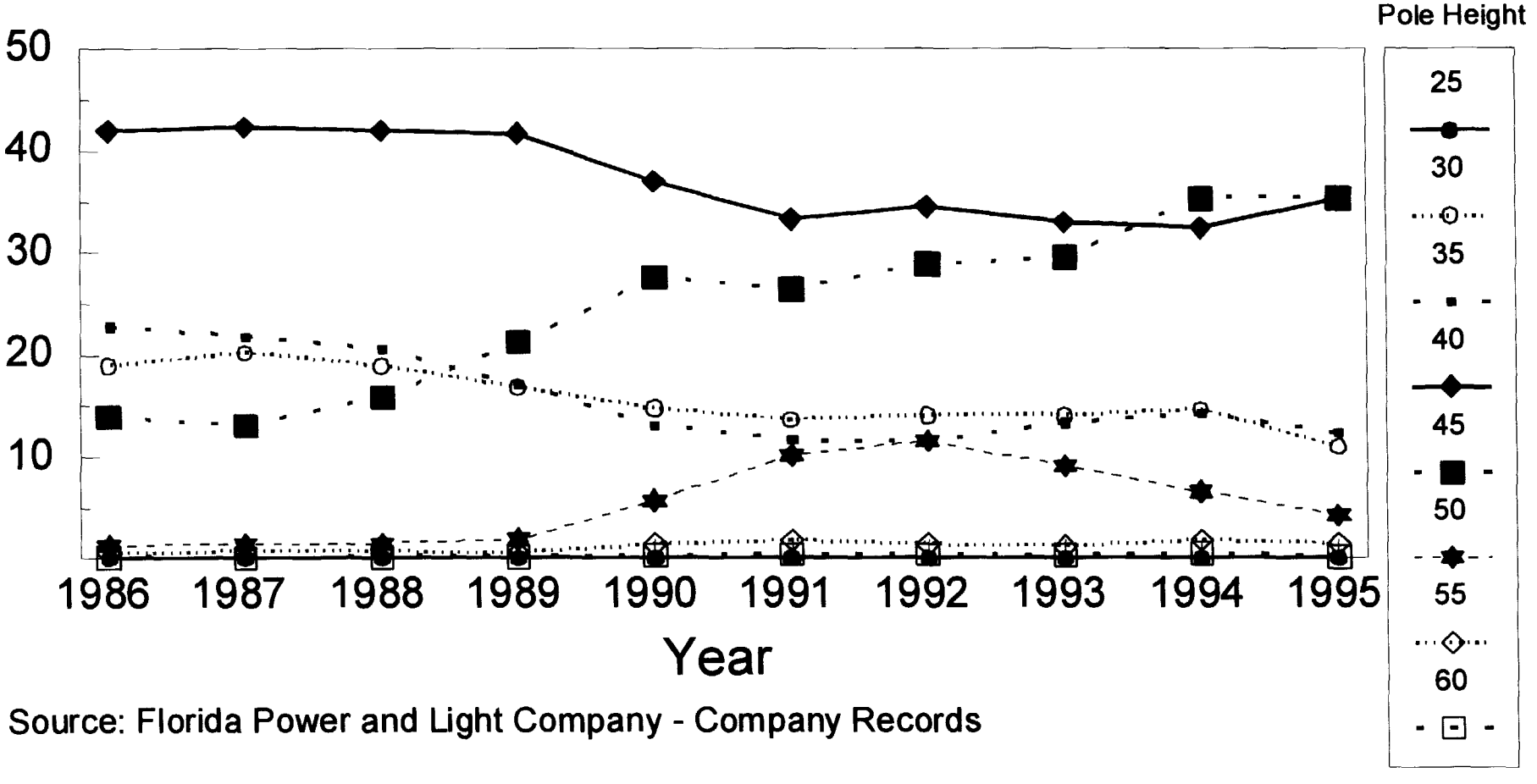


Approximately five to six feet of usable space.

Exhibit 2

10 Year Trend of Pole Additions

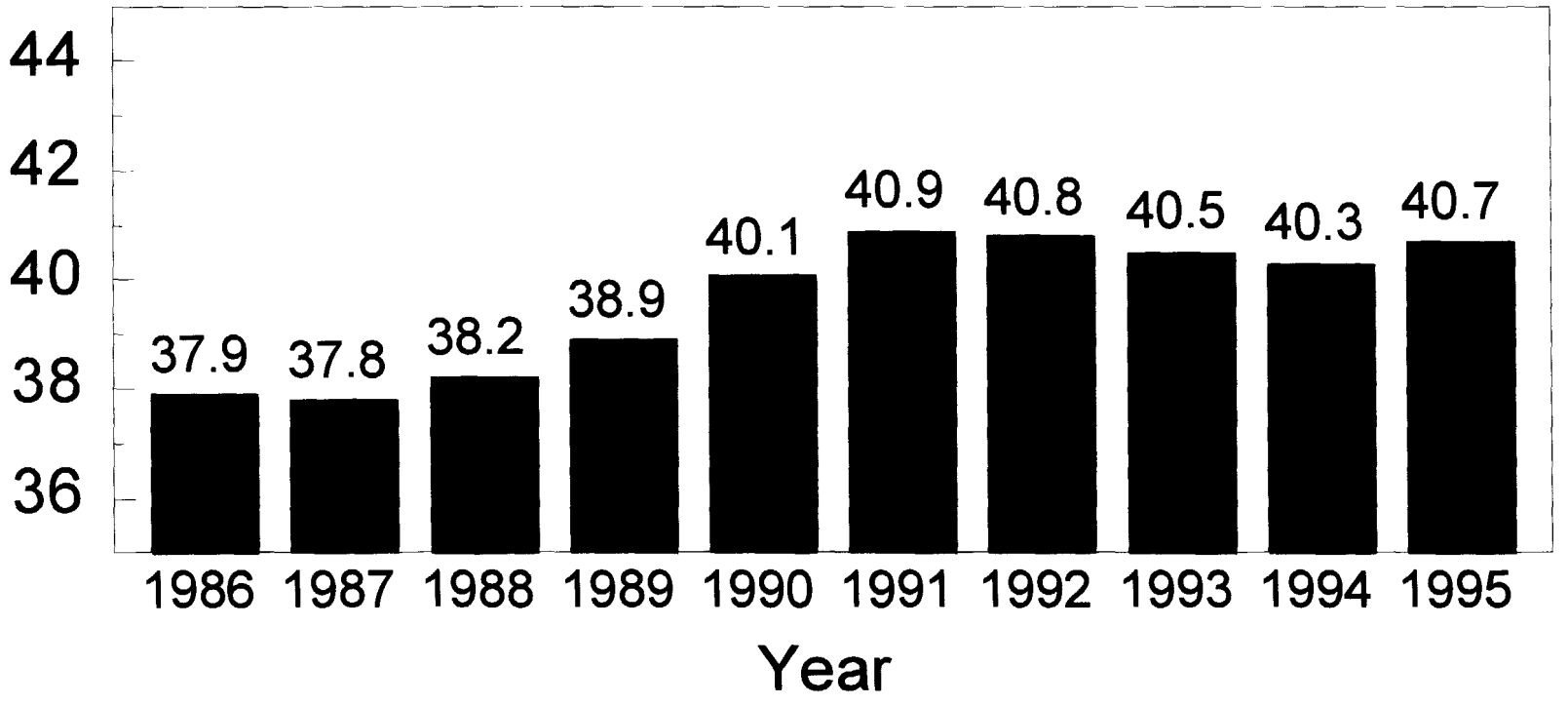
% of Total Additions



Source: Florida Power and Light Company - Company Records

Exhibit 3

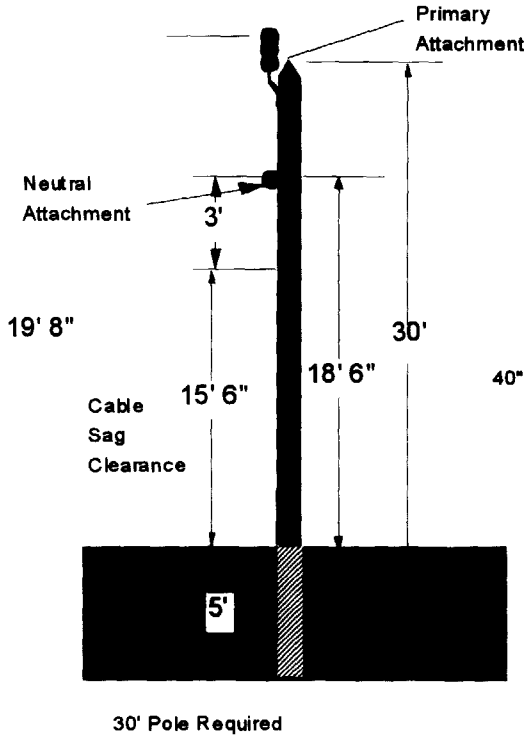
Ten Year Trend of Pole Additions
Average Pole Height
Average Pole Height (Feet)



Source: Florida Power and Light Company - Company Records

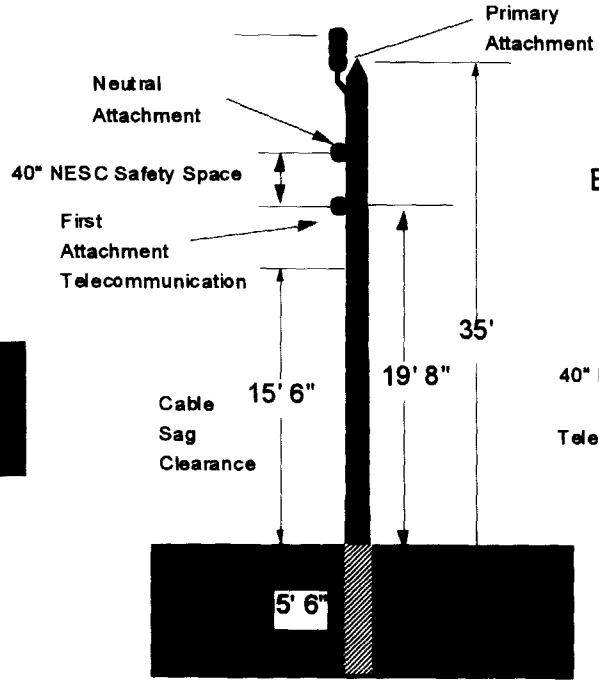
Exhibit 4

Electric Pole - No Other Attachments



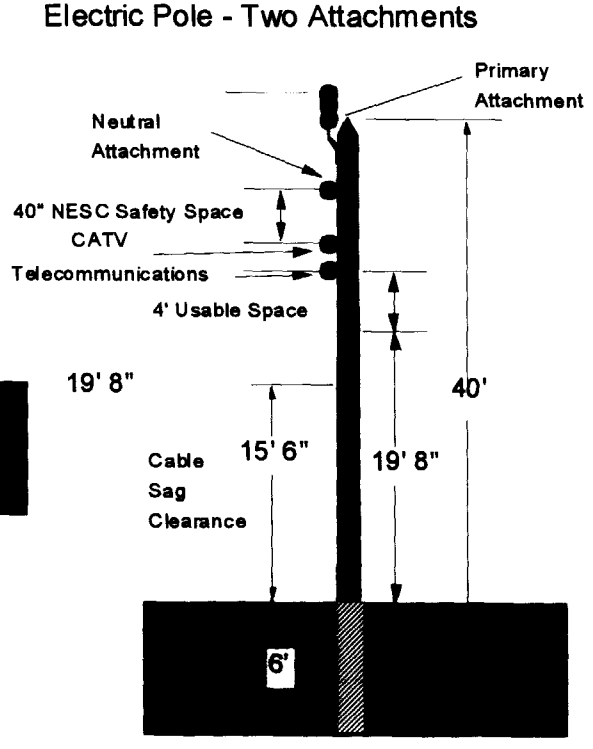
30' Pole Required

Electric Pole - One CATV Attachment



35' Pole Required

Electric Pole - Two Attachments



40' Pole Required

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 1997, I caused true and correct copies of the COMMENTS OF AMERICAN ELECTRIC POWER CORPORATION, ET. AL. to be served via hand delivery on:

William F. Caton (Original and 4 Copies)
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, DC 20554

Meredith J. Jones
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 918
Washington, DC 20554

Margaret Egler
Acting Chief
Financial Analysis and Compliance Division
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 805E
Washington, DC 20554

Catherine M. Krupka